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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ALEKSEY YURYEVICH STASYUK, Defendant and Appellant.	C079182 (Super. Ct. No. 14F07325)

Defendant Aleksey Yuryevich Stasyuk appeals from a conviction for criminal threats. He contends (1) the trial court erred in admitting evidence of uncharged domestic violence, under Evidence Code section 1109;[1] (2) his counsel rendered ineffective assistance in failing to object to that evidence; and (3) section 1109 and

[1] Undesignated statutory references are to the Evidence Code.

CALCRIM No. 852 inherently violate his right to due process and a fair hearing. We disagree and shall affirm.

FACTUAL BACKGROUND[2]

The charged offenses occurred the night of October 21, 2014, and early the following morning.[3] Evidence of three uncharged domestic violence incidents was admitted by the trial court: one that occurred on May 4, one in the weeks that led up to the charged event, and one that occurred the day before.

October 21—the Charged Offenses

Defendant and the victim were married for 12 years and had two children, nine and six years old. Around 10:00 p.m., the victim was asleep in her children's bedroom, along with her two children. Their front door was locked.

She awoke to the sound of defendant calling her name. He was standing over her. She asked what he wanted. He said, "we need to talk." She told him they had already discussed it all. He replied that he would not leave without anything. She then got up and asked him to leave the children's room.

They left the bedroom and argued. He wanted to take his belongings. She told him that he had already taken everything of value. They started yelling.

At some point, defendant left the apartment. When he came back, he was walking nervously back and forth. They continued to argue. Defendant said he wanted sex. She told him everything was over. He said he would return what he had taken in exchange

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2 The testimony of several witnesses gave rise to inconsistencies, particularly as to the timeline. We resolve all explicit evidentiary conflicts in favor of the judgment and presume in its favor all reasonable inferences. (*People v. Mack* (1992) 11 Cal.App.4th 1466, 1468.)

3 All further references to dates are to the year 2014, unless otherwise indicated.

for sex. She said everything was over between them, and she would replace what he took.

At some point, the victim went into the children's bedroom and closed the door. Defendant knocked loudly, kicking and hitting the door and sounding angry. The children remained asleep.

When she came out, they talked more, and at some point defendant said he was going to take a shower. He began to disrobe and went into the bathroom.

With him in the bathroom, the victim went outside to see if he had brought their car with him. Defendant would take their car and be gone for days. Not seeing the car, she returned to the apartment. Defendant met her at the entrance and they continued to argue. She confronted him about the car being missing. He told her it was "at a place where you will not be able to find it." The victim started crying.

At some point, defendant grabbed a big steel knife from the kitchen. He said to her, "I'm going to cut you into little bits" and "I'm going to kill you."

The victim quickly left the apartment. She tried to reach the adjacent apartment to ask the neighbor to call the police, but defendant followed her, holding the knife. He made some sort of motion at her. She ducked and screamed.[4] He then stopped.

She ran to the parking lot, and he followed, still holding the knife. As he tried to catch her, she kept a car between them. She told him to quiet down and give her the knife or she would call 911. At some point, she called out for help.

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[4] On direct, the victim was asked if she remembered telling an officer that defendant said he was going to kill her. She responded, "I don't remember."

Defendant finally stopped chasing her when she pointed to a man standing at a neighbor's apartment and said, "people are watching." Defendant hid the knife under his jacket.

The victim ran back toward the apartment complex. The next-door neighbor slightly opened his door and she yelled to him to call the police. She ran to her upstairs neighbor, whom she knew, told him defendant was not himself, and asked for his help.

Around that time, the next-door neighbor saw defendant running away as two men came down from an upstairs apartment, and a fight ensued. The neighbor could not tell who was the aggressor. But he saw the two men push defendant to the ground and kick him. The neighbor ran up to stop them, saying, "that's enough, you will kill him." The neighbor called 911.

The next time the victim saw defendant, her neighbors had apprehended him and were bringing him back to the apartment complex. At some point, she saw defendant put the knife down on the coffee table next to the entrance door.

A deputy sheriff responded to the 911 call. When he arrived he saw the victim standing in front of her apartment complex, along with two men who were standing, and another man (defendant) was on the ground. The victim was distraught, crying, and shaking. She showed an officer where defendant had left the knife. The door to the children's bedroom appeared to have been banged on, with a loose hinge and holes, possibly from punching. She told the officer she wanted to press charges against defendant.

After the incident, the friend of the upstairs neighbor, who witnessed the events and helped capture defendant, went to live with the victim; he stayed as a roommate for about a month. Sometime after the incident, the victim was evicted. She and her children moved in with defendant's sister.

***May 4th Incident*[5]**

Five months earlier, when the victim told defendant she wanted a divorce, defendant threw a metal pot and coffee mug at her, but missed. When she yelled, he covered her mouth. He took her cell phone and broke it.[6] He then pushed her twice and threw a vacuum cleaner, hitting her knees.

Weeks Leading Up to October 21

Several weeks before the charged incident, defendant pinned the victim against the refrigerator, while holding a large kitchen knife. He told her he was going to stab her. He then stabbed the refrigerator with the knife.

October 20th—the Day Before the Incident

The night before the charged incident, defendant came to the victim's home, around three or four o'clock in the morning. He broke a window next to the front door. He fled when he saw the victim.[7]

Admission of Evidence of the Three Uncharged Domestic Violence Incidents

At trial, the prosecution moved in limine to admit evidence of the three uncharged domestic violence incidents, under section 1109. When given an opportunity to respond, defense counsel said: "[I] don't want time to respond to that. I'm aware of what [the prosecutor] is introducing. I agree she has the legal right, obligation to introduce that.

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5 The facts are taken from the prosecution's written motion.

6 During her cross-examination at trial, the victim was asked whether the argument that day had started when defendant saw "inappropriate sexual type text messages" on her phone. She responded, "I don't remember."

7 During her cross-examination at trial, the victim explained that another man was with her at the time. Defendant saw them. The two were not having sex but "were getting there."

It's directly to my client and the complaining witness in this case. She will be on the stand to testify, so I don't anticipate any issues with that particular one."

But defense counsel did raise concern regarding the October 20th window-breaking incident. He did not believe it came under section 1109 because it did not involve violence. But he agreed the incident would come in as evidence of how defendant entered the victim's locked apartment. The court deferred ruling on whether the window breaking would come in under section 1109 or as evidence of how defendant entered the apartment during the charged incident.

As to the other two uncharged domestic violence incidents, the court stated it was "prepared to allow the People to introduce [them] as [section] 1109 evidence . . . ." As to the window breaking, the court added: "I will note that in terms of the . . . [section] 352 considerations, I do in balancing out [section] 352, I don't find it to be [a section] 352 concern. I don't think of it as [necessitating] undue consumption of time, and I don't think it would mislead or confuse the jury. While certainly there would be some prejudice, I don't think it would be [a] substantial danger of undue prejudice. Of course, it is highly probative."

The record does not reflect that either party requested a final ruling on how the window-breaking incident would be admitted, nor was there any objection when the victim testified to it.

Verdict and Sentencing

After being instructed on the use of uncharged domestic violence evidence (CALCRIM No. 852),[8] the jury convicted defendant of criminal threats (Pen. Code,

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[8] CALCRIM No. 852 provides, in pertinent part: "You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged domestic violence. [¶] . . . If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide that the

§ 422—count two) and found he had personally used a deadly weapon. But it acquitted him of assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)—count one) and the lesser included crime of assault.

The court imposed the low term of 16 months in state prison. It struck punishment, in the interest of justice, for the deadly weapon enhancement under Penal Code section 1385.

DISCUSSION

1.0 Defendant's Challenge to the Admission of the Uncharged Domestic Violence Conduct Evidence Is Forfeited

On appeal, defendant first contends the trial court erred in admitting evidence of his uncharged domestic violence conduct under section 1109. He argues the court failed to conduct a section 352 analysis of the phone-breaking and refrigerator-stabbing incidents. Further, any implied section 352 analysis was based on an erroneous standard. And, the degree of certainty that the incidents had occurred was low.

This contention is forfeited on appeal because defense counsel did not object to evidence of the first two incidents but rather conceded their admissibility. "In the absence of a timely and specific objection on the ground sought to be urged on appeal, the trial court's rulings on admissibility of evidence will not be reviewed." (*People v. Clark* (1992) 3 Cal.4th 41, 125-126, abrogated on other grounds as noted in *People v.*

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defendant committed the uncharged domestic violence, you may but are not required to conclude from that evidence that the defendant was disposed or inclined to commit domestic violence, and based on that decision, also conclude the defendant was likely to commit and did commit the crimes charged. [¶] If you conclude that the defendant committed the uncharged domestic violence, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove the defendant is guilty of the charged offenses. The People must still prove each charge and allegation of every charge beyond a reasonable doubt."

Edwards (2013) 57 Cal.4th 658, 704; see *People v. Zapien* (1993) 4 Cal.4th 929, 958 ["In the absence of such an objection, the trial court had no duty to make an express ruling based upon a weighing of relevance and prejudice under Evidence Code section 352."].)

2.0 Defense Counsel Did Not Render Ineffective Assistance in Failing to Object to the Section 1109 Evidence

Defendant next contends his trial counsel rendered ineffective assistance in failing to object to the introduction of the uncharged domestic violence evidence. He argues the case against him was weak, mainly because the victim lacked credibility. And the jury, by acquitting him of one count, may have reached a compromise verdict to punish him for his uncharged conduct. In light of that, his counsel's failure to object to the section 1109 evidence and to request a section 352 analysis was unjustified. We disagree.

Section 1109, subdivision (a)(1) permits evidence of other domestic violence acts to show propensity for domestic violence, so long as the evidence is not made inadmissible by section 352. (§ 1109.) Section 352 renders inadmissible evidence of past domestic violence where the prejudicial impact substantially outweighs probative value. (*People v. Johnson* (2010) 185 Cal.App.4th 520, 531 (*Johnson*).)

The principal factor affecting probative value is the uncharged act's similarity to the charged offense. (*Johnson, supra,* 185 Cal.App.4th at p. 531.) Section 1109 "reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are 'uniquely probative' of guilt in a later accusation." (*Id*. at p. 532.) Domestic violence is " 'typically repetitive' " in nature. (*Ibid*.)

" ' "[P]rejudice," ' " by contrast, " 'applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues.' " (*People v. Bolin* (1998) 18 Cal.4th 297, 320.) " ' "[P]rejudicial" is not synonymous with "damaging." ' " (*Ibid*.) " ' "In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the

jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction." ' " (*People v. Howard* (2010) 51 Cal.4th 15, 32.) "Relevant factors in determining prejudice include whether the prior acts of domestic violence were more inflammatory than the charged conduct, the possibility the jury might confuse the prior acts with the charged acts, how recent were the prior acts, and whether the defendant had already been convicted and punished for the prior offense(s)." (*People v. Rucker* (2005) 126 Cal.App.4th 1107, 1119.)

Here, defense counsel's decision not to object did not fall below an objective standard of reasonableness because the evidence was plainly admissible.[9] (See *People v. Riel* (2000) 22 Cal.4th 1153, 1202 ["trial counsel . . . have no duty to object simply to generate appellate issues"]; see also *People v. Thompson* (2010) 49 Cal.4th 79, 122 ["[c]ounsel . . . not ineffective for failing to make frivolous or futile motions"].)

All three instances of uncharged domestic violence were highly probative.[10] They involved the same victim and generally similar conduct. Their probative value was not substantially outweighed by prejudicial impact. The most serious uncharged incident (the refrigerator stabbing) was not more inflammatory than the charged offenses, which also involved threatening with a knife. The uncharged incidents, though similar, were sufficiently distinct that a jury would not likely confuse them with the charged acts. The uncharged acts were close in time, occurring no more than five months before the charged acts. And while defendant had not been punished for his prior acts, the risk that

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9 To establish ineffective assistance of counsel, a defendant must show (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [80 L.Ed.2d 674].)

10 We consider the window breaking a domestic violence incident.

the jury would be motivated to punish him for them was outweighed by their probative value. Finally, nothing indicated the evidence would confuse the issues, mislead the jury, or consume undue time.

As such, counsel's choice not to object fell well within an objective standard of reasonableness under prevailing professional norms. (See *People v. Riel*, *supra*, 22 Cal.4th at p. 1202 ["Sometimes, the best action an attorney can take regarding an available objection is not to make it."].) And even if we could find error in counsel's performance, the evidence of the charged criminal threats (the only count defendant was convicted of) was sufficient to render any error harmless.

3.0 Section 1109 and CALCRIM No. 852 Did Not Inherently Violate Defendant's Right to a Fair Trial and Due Process

Finally, to exhaust his state remedies and preserve his right to a federal challenge, defendant raises two contentions, both settled under California law. He contends both section 1109 and CALCRIM No. 852 inherently violate his right to a fair trial and due process. He concomitantly contends his counsel rendered ineffective assistance in failing to raise these objections below. He acknowledges, however, that we are bound to follow state law precedent finding both the statute and instruction constitutional. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455-456.)

Defendant having now raised these contentions, we reject them under settled California law. (See *Johnson, supra*, 185 Cal.App.4th at p. 529 ["The Courts of Appeal . . . have uniformly followed the reasoning of [*People v.*] *Falsetta* [(1999) 21 Cal.4th 903] in holding section 1109 does not offend due process."]; *People v. Reyes* (2008) 160 Cal.App.4th 246, 253 [rejecting contentions that CALCRIM No. 852 violated the defendant's due process rights].)

DISPOSITION

The judgment is affirmed.

BUTZ, Acting P. J.

We concur:

DUARTE, J.

RENNER, J.